Re John Fong Nyuk Foh; ex p Teck Guan Trading Sdn Bhd

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D-2-29-2972 OF 1996
ABDUL AZIZ J
22 APRIL 1998

Bankruptcy *— Notice — Setting aside — Delay in filing affidavit in opposition — Whether affidavit filed not less than three days before the hearing date — Calculation of time — Bankruptcy Rules 1969 rr 22, 26 & 95(2)*

The judgment debtor filed an application to set aside a bankruptcy notice which was scheduled to be heard on 1 December 1997. The notice of hearing had been given on 26 September 1997. However, the judgment creditors filed their affidavit in opposition only on 26 November 1997. On the day of hearing, the judgment debtor raised a preliminary objection to the affidavit in opposition on the ground of delay based on r 26 of the Bankruptcy Rules 1969 ('the Rules') which provides that the affidavit in opposition shall be filed not less than three days before the hearing date. The senior assistant registrar ruled in favour of the judgment creditors and admitted the affidavit in opposition but he adjourned the hearing to 19 December 1997 to enable the judgment debtor to peruse and reply to the affidavit in opposition. The judgment debtor appealed. Rule 22 of the Rules was raised as another ground for disqualifying the judgment creditors' affidavit in opposition. The judgment creditors contended, inter alia: (i) the date of hearing of the setting aside application was 19 December 1997 by virtue of r 95(2) of the Rules; and (ii) even if the affidavit did not comply with r 22, the court had discretion to admit it.

Held, dismissing the appeal:

(1) Rule 95(2) is not about changing the date of hearing of the setting aside application. It is about extension of the time specified in the bankruptcy notice for compliance with its requirement because the setting aside application could not be heard before the expiry of that time. Therefore, for the purposes of rr 22 and 26, the date of hearing of the setting aside application was 1 December 1997 (see p 524B–C).

(2) Rule 26 does not say three clear days. It only says three days. Because r 22 says clear days and r 26 does not say clear days, r 26 cannot intend clear days. While, between 26 November and 1 December there were, by clear reckoning, four clear days, there were, by normal reckoning, five days. Excluding Saturday and Sunday, there were left three days, which was good for r 26. Therefore, the filing of the affidavit in opposition complied, as to time, with r 26. The senior assistant registrar was therefore right, as far as r 26 was concerned, to admit the affidavit (see p 524E–G).

(3) The court could not decide this appeal on the basis of considerations that would arise if an objection on the basis of r 22 had been raised before the senior assistant registrar when in fact such an objection had not been raised. The court could not now disqualify the affidavit in opposition on the ground that justice to the judgment debtor demanded that his setting aside application must be heard on 1 December 1997 and therefore the judgment creditors' delayed affidavit in opposition must not be read, because the fact was that the senior assistant registrar did adjourn the hearing of 1 December 1997 for the benefit of the judgment debtor when he correctly admitted the affidavit in opposition after considering r 26, which was the only rule on which the judgment debtor expressly founded his objection to the affidavit. That postponement was judicially fair in the circumstances prevailing at the time. Therefore, notwithstanding the non-compliance with r 22, these were good reasons for not now disqualifying the affidavit in opposition (see pp 526F–527A).

[Bahasa Malaysia summary

Penghutang penghakiman telah mefailkan permohonan untuk mengketepikan suatu notis kebankrapan yang telah dijadualkan untuk perbicaraan pada 26 September 1997. Sebaliknya pemiutang-pemiutang penghakiman telah memfailkan afidavit untuk menentang hanya pada 26 November 1997. Pada hari perbicaraan, pemiutang penghakiman telah menimbulkna bantahan awal terhadap afidavit untuk menentang atas dasar kelengahan berdasarkan k 26 Kaedah-kaedah Kebankrapan ('Kaedah-Kaedah tersebut') yang memperuntukkan bahawa afidavit untuk menentang mestilah difailkan tidak kurang daripada tiga hari sebelum tarikh perbicaraan. Penolong Kanan Pendaftar telah memberikan keputusan berpihak kepada pemiutang-pemiutang penghakiman dan telah menerima afidavit untuk menentang tersebut tetapi beliau telah menangguhkan perbicaraan kepada 19 Disember 1997 untuk membolehkan penghutang penghakiman untuk melihat dan menjawab afidavit untuk menentang. Penghutang penghakiman telah merayu. Pemiutang-pemiutang penghakiman menegaskan ,antara lain: (i) tarikh perbicaraan untuk mengketepikan permohonan adalah pada 19 Disember 1997 berdasarkan k 95(2) Kaedah-Kaedah tersebut; dan (ii) walaupun afidavit tersebut tidak mengikut k 22, mahkamah mempunyai budi bicara untuk menerimanya.

Diputuskan, menolak rayuan:

(1) Kaedah 96(2) bukanlah berkenaan penggubalan tarikh permohonan pengketepian. Ia adalah berkenaan lanjutan masa yang telah dinyatakan secara spesifik dalam notis kebankrapan untuk mematuhi keperluannya oleh kerana permohonan pengketepian tidak boleh didengar sehingga masa tersebut luput.

Oleh itu, bagi tujuan kk 22 dan 26, tarikh perbicaraan untuk permohonan pengketepian adalah pada 1 Disember 1997 (lihat ms 524B–C). A

(2) Kaedah 26 tidak menyatakan tiga hari genap. Ia hanya menyatakan tiga hari. Oleh kerana k 22 telah menyatakan hari-hari genap dan k 26 tidak menyatakan hari-hari genap, k 26 tidak meniatkannya sebagai hari-hari genap. Sementara, antara 26 November dan 1 Disember terdapat, dari perhitungan jelas, empat hari, dan dari perhitungan biasa, lima hari. Dengan mengecualikan hari-hari Sabtu dan Ahad, hanya tinggal tiga hari, yang masih baik untuk k 26. Oleh itu, pemfailan afidavit untuk menentang adalah menurut masa yang diperuntukkan dalam k 26. Penolong kanan pendaftar tersebut adalah betul, setakat berkenaan dengan k 26, untuk menerima afidavit tersebut (lihat ms 524E–G). B C

(3) Mahkamah tidak boleh memutuskan rayuan ini berdasarkan pertimbangan-pertimbangan yang akan timbul jika suatu bantahan berdasarkan k 22 telah ditimbulkan di hadapan penolong kanan pendaftar, apabila dalam fakta, bantahan sedemikian tidak ditimbulkan. Mahkamah tidak boleh mengecualikan afidavit untuk menentang tersebut atas dasar bahawa keadilan kepada penghutang penghakiman menuntut bahawa permohonan pengketepian mestilah didengar pada 1 Disember 1997 dan, oleh itu, afidavit yang dilengahkan oleh pemiutang penghakiman tidak boleh dibaca, kerana fakta adalah bahawa penolong kanan pendaftar telah menangguh perbicaraan pada 1 Disember 1997 bagi faedah penghutang penghakiman di mana beliau telah secara betul menerima afidavit untuk menentang selepas mempertimbangkan k 26, yang merupakan kaedah tunggal di mana penghutang penghakiman telah secara nyata mendasarkan bantahan terhadap afidavit tersebut. Penangguhan tersebut adalah adil berdasarkan keadaan yang wujud pada masa tersebut. Oleh itu, walaupun terdapat ketidakpatuhan kepada k 22, terdapat sebab-sebab baik untuk tidak mengecualikan afidavit untuk menentang tersebut (lihat ms 526F–527A).] D E F G

Notes H

For cases on setting aside of a bankruptcy notice, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1766–1785.

Cases referred to I

Structural Concrete Sdn Bhd & Ors v *Wing Tiek Holdings Bhd* [1997] 1 MLJ 581 (refd)

Legislation referred to

Bankruptcy Rules1969 rr 22, 26, 95(2), 276
Rules of the High Court 1980 O 2, 3 r 2(5), O 32 r 13(2)(b)

Gurmeet Kaur Sidhu (*Shearn Delamore & Co*) for the judgment creditors.
Alice Koay (*Cheah Teh & Su*) for the judgment debtor.

Cur Adv Vult

Abdul Aziz J: This judgment is only on that part of the present appeal that concerns the judgment creditors' affidavit in opposition to the judgment debtor's application to set aside the bankruptcy notice. The learned senior assistant registar has allowed the affidavit to be read despite objection by the judgment debtor's counsel.

The judgment debtor's application to set aside the bankruptcy notice was scheduled to be heard on 1 December 1997 before the senior assistant registar. The notice of hearing had been given on 26 September.

According to r 22 of the Bankruptcy Rules1969, if the judgment creditors intended to use an affidavit in opposition to the application, they 'shall deliver' a copy of it to the judgment debtor 'not less than three clear days before' the hearing date 1 December 1997, a Monday.

According to r 26, the affidavit in opposition 'shall be filed with the Registrar not less than three days before' 1 December 1997.

Despite having had notice of hearing as far back as September 1997, the judgment creditors filed their affidavit in opposition dated 19 November (encl (10)) only on 26 November, a Wednesday. As to the date when a copy of the affidavit in opposition was delivered to the judgment debtor, although it was not specifically stated in submission, I take it, from the way the submissions went, that it was also 26 November.

Before the senior assistant registar on the day of hearing, 1 December, learned counsel for the judgment debtor raised a preliminary objection to the affidavit in opposition on the ground of delay. Rule 26 was raised and argued on. Rule 22 was not raised and there was no argument on it. The senior assistant registar ruled in favour of the judgment creditors and admitted the affidavit in opposition, but he adjourned the hearing to 19 December to enable the judgment debtor to peruse and reply to the affidavit in opposition.

In the appeal before me, r 22 was raised by counsel for the judgment debtor as another ground for disqualifying the judgment creditors' affidavit in opposition.

I respectfully disagree with learned counsel for the judgment creditors that for the purposes of rr 22 and 26 the date of hearing of the setting-aside application was 19 December. She seemed to think that the adjournment of the hearing from 1 December to 19 December was the exercise of some special power by which the date of hearing had been changed to 19 December. I say that because she placed reliance on para (2) of r 95, which provides as follows:

95 (1) The filing of an affidavit shall operate as an application to set aside the bankruptcy notice, and thereupon the Registrar shall fix a day for hearing the application, and shall give not less than three clear days' notice thereof to the debtor, the creditor and their respective solicitors, if known. A

(2) If the application cannot be heard before the time specified in the notice for compliance with its requirements, the Registrar shall extend the time, and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined. B

Paragraph (2) of r 95 is not about changing the date of hearing of the setting-aside application. It is about extension of the time specified in the bankruptcy notice for compliance with its requirements because the setting-aside application cannot be heard before the expiry of that time. I hold that, for the purposes of rr 22 and 26, the date of hearing of the setting-aside application was 1 December. C

Learned counsel for the judgment creditors has conceded that there had been non-compliance with r 22, which speaks of 'not less than three clear days'. There must have been at least three clear days between Wednesday 26 November, the date of delivery of the affidavit in opposition, and Monday 1 December, the date of hearing. Because the three days must be clear days, 26 November and 1 December must be excluded. That would have left four days, Thursday, Friday, Saturday and Sunday. Because of O 3 r 2(5) of the Rules of the High Court 1980, which is applicable by virtue of r 276 of the Bankruptcy Rules 1969, Saturday and Sunday must be excluded. That would have left only two clear days, when three were required. D E

Now as for r 26, it does not say three clear days. It only says three days. Because r 22 says clear days and r 26 does not say clear days, r 26 cannot intend clear days. While, between 26 November and 1 December, there were, by a clear reckoning, four clear days, there were, by normal reckoning, five days. Excluding Saturday and Sunday, there were left three days, which was good for r 26. F

I rule, therefore, that the filing of the affidavit in opposition complied, as to time, with r 26. The senior assistant registar was therefore right, as far as r 26 was concerned, to admit the affidavit. He was not concerned with the position under r 22 because no complaint had been raised on the basis of that rule. G

While conceding that the affidavit did not comply with r 22 for having been filed one clear day short of the minimum three clear days required, counsel for the judgment creditors submitted that the court might still exercise its discretion to admit it. She relied on the Court of Appeal decision in *Structural Concrete Sdn Bhd & Ors* v *Wing Tiek Holdings Bhd* [1997] 1 MLJ 581. H

That case concerned an application by the defendants for the setting aside of a default judgment. The return date for the application was 13 February 1995. According to O 32 r 13(2)(b) of the Rules of the High I

Court 1980, the plaintiffs must file and serve their affidavit in reply within 14 days from the date on which the defendants' affidavit in support of their setting-aside application was served on the plaintiffs. The plaintiffs did so on 11 January 1995, which the Court of Appeal seemed to consider was not within the 14 days set by O 32 r 13(2)(b), but was one day after the 14 days. The defendants, on the date of hearing, 13 February 1995, had taken objection to the plaintiff's affidavit on that ground. The principle the Court of Appeal adopted in the computation of the 14 days that resulted in the finding of delay is not important for the present appeal. The importance of that case for present purposes is the view taken by the Court of Appeal that the affidavit could be accepted in the proper exercise of the court's discretion under O 2, which empowers the court to either treat the failure to comply with the requirement as to time as an irregularity which does not nullify the affidavit or to set aside the affidavit on the ground of the failure.

It is important to note that the time limit set by O 32 r 13(2)(b) is not set by reference to the date of the hearing in which the affidavit in question is to be used, which would be a future event. It is set by reference to a past event, namely, the service of the affidavit intended to be replied to. That being the case, in *Structural Concrete* it turned out that, while there had been a delay in serving the plaintiffs' affidavit in that the service was done beyond the period allowed, the delay could not have prejudiced the defendants in any way because when the plaintiffs served their affidavit on 11 January there was still another month to go before the date of hearing, 13 February. If the defendants' solicitors had needed to peruse the affidavit and take instructions on it or prepare a reply to it, they would have had plenty of time in which to do it.

In the present case, had an objection to the judgment creditors' affidavit in opposition been raised before the senior assistant registar on 1 December 1997 specifically on the basis of r 22, but he nevertheless admitted the affidavit and either proceeded to hear the judgment debtor's setting-aside application or adjourned the hearing of the application to enable the judgment debtor to reply to the judgment creditors' affidavit in opposition, and the judgment debtor appealed against the admission of the affidavit, I would, in dealing with the appeal, even though it is by way of a rehearing, but because the question of time is very much a relevant consideration in deciding the judgment debtor's objection at the time it was made, imagine myself hearing the objection on 1 December 1997 and consider how I might have dealt with it. And this is how I might have viewed the matter. The judgment debtor needed to have the bankruptcy notice set aside to save himself from bankruptcy. The judgment creditors had had plenty of time before the date of hearing to serve their affidavit in opposition. The rule says that they must deliver it so as to give the judgment debtor at least three clear days before the date of hearing. The time limit is set by reference to the date of hearing. Three clear days is the minimum period before the hearing date that the rule considers a judgment debtor would need to usefully react to an affidavit in opposition. It is already short enough a

period. By delivering their affidavit in opposition only when the date of hearing was already near, the judgment creditors gave the judgment debtor only two clear days, which the rule regards as insufficient for the judgment debtor's needs. I might have felt that, even should I have the discretion to admit the affidavit, I ought not to admit it and proceed to hear the judgment debtor's application, because it would not be fair to the judgment debtor who had not had enough time over the affidavit. To admit the affidavit nonetheless in face of the judgment debtor's objection, I would have to postpone the hearing of the judgment debtor's application to another date so as to give the judgment debtor the necessary minimum three full days to react to the affidavit in opposition. But that would mean delaying the judgment debtor's application for the clear fault of the judgment creditors in filing their affidavit at a late hour when they have had plenty of time to prepare and serve their affidavit. The judgment debtor would have been entitled to insist that his application be heard without further delay. So even should I have the discretion to admit the affidavit, I might not have been minded to exercise the discretion in favour of the judgment creditors because they had clearly been at fault. I might have refused to admit the affidavit and, disregarding it, proceeded to hear the judgment debtor's application. Viewing the matter thus, I might allow the appeal and disqualify the judgment creditors' affidavit in opposition.

But that, as I said, might be the position had the judgment debtor objected to the affidavit on the ground of r 22. But he did not. He did not complain that he did not have the three clear days under r 22. His complaint was under r 26, and it was unfounded, and so the senior assistant registar admitted the affidavit, but to be fair to the judgment debtor he adjourned the hearing to give him time to respond to the affidavit, and he has in fact filed two affidavits in reply.

Although an appeal from a decision of a senior assistant registar is by way of a rehearing, in deciding an appeal in a case of this nature the actual circumstances prevailing at the time of the decision appealed from — that is the decision to admit the judgment creditors' affidavit in opposition — cannot be overlooked. I cannot decide this appeal on the basis of considerations that would arise if an objection on the basis of r 22 had been raised before the senior assistant registar when in fact such an objection had not been raised. I cannot now disqualify the affidavit in opposition on the ground that justice to the judgment debtor demanded that his setting-aside application must be heard on 1 December 1997 and therefore the plaintiffs' delayed affidavit in opposition must not be read, because the fact is that the senior assistant registar did adjourn the hearing of 1 December 1997 for the benefit of the judgment debtor when he correctly admitted the affidavit in opposition after considering r 26, which was the only rule on which the judgment debtor expressly founded his objection to the affidavit. That postponement was judicially fair in the circumstances prevailing at the time. It was made for the benefit of the judgment debtor. It might have been prejudicial to him if an adjournment had not been ordered. And the judgment debtor has

A benefited from it by having had sufficient time to file two affidavits in reply to the plaintiffs' affidavit in opposition. I think that, notwithstanding the non-compliance with r 22, these are good reasons for not now disqualifying the affidavit in opposition. I therefore dismiss the appeal concerning it.

B *Appeal dismissed.*

Reported by Jafisah Jaafar

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